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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK and THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether States surrender their jurisdiction over retail transmission to the Federal Energy Regulatory Commission ("FERC"), changing the jurisdictional lines established by the Federal Power Act, if they permit retail customers to choose a power supplier different from the retail transmission supplier.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Interest of the *Amici Curiae*	1
Summary of Argument	2
Argument	4
I. FERC's Claim Of Jurisdiction Over Retail Transmission Is Contrary to the Purpose of the Federal Power Act, its Legislative History, the Statutory Language and this Court's Decisions.	4
A. The States Have Always Had Jurisdiction Over Retail Transmission, Because the Purpose of the Federal Power Act Is to Preserve State Jurisdiction.	4
B. The Case Law and the Legislative History Dispositively Establish That "Local Distribution" Is a "Part" of Transmission in Interstate Commerce That Section 201 Withholds From FERC's Jurisdiction.	7
C. The Case Law and the Legislative History Dispositively Establish That "Local Distribution" Under Section 201 Includes Retail Transmission.	13

Contents

	Page
D. The Scope of FERC's Jurisdiction is Established by Statute and is not a Factual Inquiry.	18
E. FERC's Jurisdictional Analysis Misuses This Court's Precedents.	22
II. FERC's Construction Of Section 201 Is Not Entitled to Deference.	25
III. The Consequences Of FERC's Assertion Of Jurisdiction Over Retail Transmission Are Terribly Intrusive Of State Regulatory Authority.	27
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 19, 20

Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n, 461 U.S. 375 (1983) 4, 13, 14, 16, 22

California Power Exch. Corp., 1998 FERC LEXIS 2361 (Nov. 24, 1998) 28

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 25, 26

Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945) ..... *passim*

East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931) 24, 25

FPC v. East Ohio Gas Co., 338 U.S. 465 (1950) .. 22, 24

FPC v. Florida Power & Light Co., 404 U.S. 453 (1972) 22, 23, 25, 30

FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 4, 5, 10, 14, 18, 19, 23

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 24, 28

Page

Jersey Central Power & Light Co. v. FPC, 319 U.S. 61 (1943) 10, 22, 23, 25

Missouri v. Kansas Gas Co., 265 U.S. 298 (1924) 4, 13, 14, 15, 16, 22

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Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 29

Panhandle Eastern Pipe Line Co. v. Michigan Public Serv. Comm'n, 341 U.S. 329 (1951) 13, 24

Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507 (1947) 10, 13, 14

Pennsylvania Gas Co. v. Public Service Comm'n, 252 U.S. 23 (1920) 9, 10, 15, 16, 17, 24, 25

Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) ..... *passim*

San Diego Gas & Elec. Co. v. Sellers of Energy, 93 FERC ¶ 61,121 (2000), 93 FERC & 61,294 (2000) 27, 28

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Page

Southern Nat. Gas. Corp. v. Alabama, 301 U.S. 148 (1937) 25

United States v. Public Utils. Comm'n of California, 345 U.S. 295 (1953) 5, 14, 15, 23

Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 8

Statutes:

16 U.S.C § 824 ..... 8, 11, 13, 15, 16, 18, 25

16 U.S.C § 824a 25, 26

16 U.S.C. § 824a(b) 29

16 U.S.C § 824a(b)-(d) 18

16 U.S.C. § 824(b) 23

16 U.S.C. § 824(b)(1) 7, 8, 11, 13, 15, 16, 17, 18, 23

16 U.S.C. § 824e(d) 17

16 U.S.C. § 824f 29

16 U.S.C. § 824k(g)-(h) 20

Cal. Pub. Util. Code § 334 27

Cal. Pub. Util. Code § 335 27

Cal. Pub. Util. Code §§ 345 *et seq.* 27

Cal. Pub. Util. Code § 348 27

Page

Other Authorities:

59 Fed. Reg. 35274 (July 11, 1994) 29

3 F.E.R.C. Stats. & Regs., ¶ 31,048 19

To Provide for Control in the Public Interest of Public Utility Holding Companies Using the Mails and the Facilities of Interstate Commerce, to Regulate the Transmission and Sale of Electric Energy and Natural Gas in Interstate and Foreign Commerce, and for Other Purposes:Hearings on H.R. 5423 Before the House Comm. On Interstate and Foreign Commerce, 74th Cong. (1935) ("1935 House Hearings") 5, 8, 10, 15, 16, 17, 19

H.R. Rep. No. 74-1318 (1935) ("1935 House Report") 5, 17, 18

S. Rep. No. 74-621 (1935) ("1935 Senate Report") 5, 8, 15, 16, 18, 29

To Provide for the Control and Elimination of Public Utility Holding Companies Operating, or Marketing Securities, in Interstate and Foreign Commerce and through the Mails, to Regulate the Transmission and Sale of Electric Energy in Interstate Commerce, to Amend the Federal Water Power Act, and for Other Purposes: Hearings on S. 1725 Before the Senate Comm. On Interstate Commerce, 74th Cong. (1935) ("1935 Senate Hearings") 5, 8, 10, 11, 15, 17, 29

S. Rep. No. 817, 83d Cong., 1st Sess. (1953) 24

INTEREST OF THE *AMICI CURIAE* [1]

As part of a now notorious electric utility deregulation experiment begun in the mid-1990s, California effectively ceded to FERC regulatory jurisdiction over the retail transmission facilities of the State's three large investor-owned electric utilities. As a consequence, *amici curiae* the State of California and Public Utilities Commission of the State of California ("CPUC") have first-hand experience with regulatory conflicts and retail service difficulties that result when a State loses its retail transmission jurisdiction to FERC. Our unique interest concerns California's ongoing efforts to resolve the electric utility disaster caused by retail restructuring. FERC's erroneous jurisdictional claim imposes significant constraints on California's regulatory alternatives in pulling back from the precipice.

The State of California and CPUC support the petitioner State and State Commissions' position that FERC's jurisdictional claim is erroneous and its Order 888[2] should be vacated. FERC may say, correctly, that California previously acknowledged FERC's jurisdiction over unbundled retail transmission, and now is changing its mind about changes in jurisdictional lines. Harsh experience has a way of changing minds. Here as elsewhere, it is better that wisdom come late than not at all; and that, by returning to the regulatory system Congress enacted, Sister States may benefit from "lessons in regulation . . . learned by trial and error . . . without involving a

1. **Rule 37.6 Statement.** Stanley C. Fickle, who serves as special counsel for the Public Utilities Commission of the State of California ("CPUC") in a range of litigation matters, authored large portions of this brief. Mr. Fickle is also counsel for Indianapolis Power & Light Company, an inactive party before this Court. No person or entity other than the CPUC made a monetary contribution to the preparation or submission of this brief.

2. Order No. 888, F.E.R.C. Stats. & Regs., Regulations Preambles, January 1991 - June 1996, ¶ 31,036 (00-568 Pet. App. D); Order No. 888-A, 3 F.E.R.C. Stats. ¶ Regs., & 31,048 (00-568 Pet. App. E); Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (00-568 Pet. App. F).

whole national industry in [the] experiment." *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 530 (1945) ("*CL&P*").

SUMMARY OF ARGUMENT

Retail unbundling by a State does not cause any change in the jurisdictional division of regulatory authority under the Federal Power Act. The line between federal and state jurisdiction of transmission remains exactly where it has always been, both under the Act and previously under this Court's constitutional cases that Congress adopted in the statutory law. That line is between wholesale and retail service. It remains for Congress to decide whether to confer on FERC the power over retail transmission that FERC has claimed without statutory warrant.

Under the *Attleboro* line of cases, the States regulated 100% of retail electric service, including 100% of retail transmission. As this Court has said time and again, Congress specifically intended Part II of the Federal Power Act to adopt the *Attleboro* line, and thereby to reserve to the States exclusively all regulatory jurisdiction they had under the *Attleboro* line. Consistent with that congressional intent, the States continued for another 60 years to regulate 100% of retail service, including 100% of retail transmission, under the jurisdictional provisions of the Federal Power Act that remain in effect today. FERC's claim that state decisions to unbundle retail service cause "jurisdictional lines" to "change," with FERC acquiring and the States losing jurisdiction of retail transmission, flouts the congressional intent.

The statutory division between state and federal jurisdiction is between retail and wholesale service. That is a legal standard binding on FERC. That legal standard is not a "question of fact," and may not be evaded in the guise of FERC exercising its fact-finding authority. As this Court's precedent establishes, FERC's fact-finding authority is to determine how an electric utility in fact uses particular transmission facilities — whether to provide retail service, wholesale service or both. The authority to determine whether a facility is used for wholesale transactions in interstate commerce is not authority to change the wholesale/

retail line that marks the statutory limit of FERC's jurisdiction. The statutory line is also not changed by the cases relied upon by the court below, wholesale cases that establish the expansive nature of transmission in interstate commerce but have nothing to do with retail service.

Far from giving FERC "unqualified" jurisdiction of transmission in interstate commerce, the Federal Power Act explicitly qualifies that jurisdictional grant. On the face of the statute, FERC's jurisdiction does not extend to the part of transmission in interstate commerce that constitutes local distribution. On the face of the *Attleboro* case law that Congress adopted, local distribution is retail service.

A leading case in the *Attleboro* line held — and *Attleboro* itself reiterated — that (a) transmission in interstate commerce may extend all the way to the retail customer, and (b) States properly regulate the retail "part" of that transmission in interstate commerce. Congress incorporated this law into the Federal Power Act, not only in the general sense of adopting the *Attleboro* line, but also in the specific sense of adopting the specific case that upheld the States' regulatory jurisdiction over the retail part of transmission in interstate commerce. The same points are also confirmed by this Court's leading precedent on the "local distribution" provision of the Act.

The *Attleboro* line of cases further held that the States properly regulated all — 100% of — service to retail customers, including specifically the utility's delivery of the energy to the retail customer. To describe this state-jurisdictional retail service, case law in the *Attleboro* line used the same "local distribution" term that Congress then used in the Act's jurisdictional section to limit FERC's authority. Congress further provided a statutory rule of construction for the Act's jurisdictional provisions, erroneously ignored by FERC and the court below, that resolves jurisdictional uncertainties in favor of upholding state jurisdiction over matters the States regulated under the *Attleboro* line.

FERC's erroneous claim of jurisdiction over retail transmission is an enormous intrusion into the States' regulatory

authority. It strips from retail customers the protections of public utility regulation for this part of the retail service. In a related context, this Court recently reaffirmed that the States have vital interests in regulating essential public utility service in order to protect retail customers, and that Congress has never limited the States' ability to provide that protection. California's unhappy experience, as well as recent case law involving Order 888, confirm the wisdom of those judgments.

ARGUMENT

I. FERC's Claim Of Jurisdiction Over Retail Transmission Is Contrary to the Purpose of the Federal Power Act, its Legislative History, the Statutory Language and this Court's Decisions.

A. The States Have Always Had Jurisdiction Over Retail Transmission, Because the Purpose of the Federal Power Act Is to Preserve State Jurisdiction.

Congress enacted Part II of the Federal Power Act in 1935. As this Court has said many times, the purpose of that legislation was to "fill" the so-called "*Attleboro* gap" created by *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), and its predecessors. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377-80 (1983) (reviewing cases). The *Attleboro* line of cases had held the States could not constitutionally regulate rates for wholesale transactions in gas and electricity in interstate commerce, while confirming that States could regulate all aspects of retail service. *See, e.g., Missouri v. Kansas Gas Co.*, 265 U.S. 298, 308-309 (1924). The 1935 Act therefore provided for the Federal Power Commission ("FPC") (now FERC) to regulate those wholesale transactions that the States could not. "The premise was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated." *FPC v. Southern California Edison Co.*, 376 U.S. 205, 213 (1964).

In enacting Part II of the Federal Power Act, Congress did not purport to exercise all of the authority it might have exercised

under the Commerce Clause, because its intention was to preserve, not override, state regulatory jurisdiction. *CL&P*, 324 U.S. at 525-27, 529-30. To implement this intent, the "limitations established on [federal commission] jurisdiction . . . were designed to coordinate precisely with those [the *Attleboro* line] constitutionally imposed on the states." *United States v. Public Utils. Comm'n of California*, 345 U.S. 295, 311 (1953) ("*U.S. v. CPUC*"). The result is that the state and federal regulatory commission each has authority on its allocated side of "a bright line easily ascertained, between state and federal jurisdiction." *Southern California Edison*, 376 U.S. at 215.[3]

Consistent with the legislative purpose and "bright line" design, the States continued after the 1935 Act to exercise exclusive regulatory jurisdiction over *all* public utility electric service to retail customers. This included *all* transmission service to retail customers, and *all* facilities used to provide that service. This was so regardless of any physical factors (such as the voltage of lines used for retail service), and regardless of how the facility would now be classified under a "seven-factor" test

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3. The intent of Congress to preserve and protect the States' regulatory authority within the area delimited by the *Attleboro* line, and to confine federal jurisdiction to the area forbidden to the States, pervades the legislative history. *See, e.g.*, H.R. Rep. No. 74-1318, at 8, 27 (1935) (hereafter, "1935 House Report"); S. Rep. No. 74-621, at 18, 48 (1935) (hereafter, "1935 Senate Report"); *To Provide for Control in the Public Interest of Public Utility Holding Companies Using the Mails and the Facilities of Interstate Commerce, to Regulate the Transmission and Sale of Electric Energy and Natural Gas in Interstate and Foreign Commerce, and for Other Purposes: Hearings on H.R. 5423 Before the House Comm. On Interstate and Foreign Commerce*, 74th Cong. 386, 495, 498, 501, 514, 522-23 (1935) (hereafter, "1935 House Hearings"); *To Provide for the Control and Elimination of Public Utility Holding Companies Operating, or Marketing Securities, in Interstate and Foreign Commerce and through the Mails, to Regulate the Transmission and Sale of Electric Energy in Interstate Commerce, to Amend the Federal Water Power Act, and for Other Purposes: Hearings on S. 1725 Before the Senate Comm. On Interstate Commerce*, 74th Cong. 247, 249-50, 800-01 (1935) (hereafter, "1935 Senate Hearings").

FERC first developed in the order now under review. Pet. App. D19-D20, D124-D125. States exercised their retail delivery jurisdiction regardless of whether the utility was transmitting power from its own generating plant to the retail customer (a plant that could be located either inside or outside of the utility's retail service area), or instead was transmitting to that customer, from a point of interconnection with another electric utility or other generation source, wholesale power the retail utility had purchased.[4]

Congress has never moved its "bright line" between state (retail) and federal (wholesale in interstate commerce) jurisdiction. FERC now says, however, that if a State chooses to unbundle retail power from retail delivery, thus giving retail customers a choice with respect to the identity of their power supplier, it causes a major shift in the jurisdictional line with respect to the delivery. According to FERC, the State loses, and FERC gains, regulatory jurisdiction over an enormous part of the delivery facilities and service to those retail customers — everything that is classified as retail "transmission" rather than

4. As used here, "retail utility" means the electric utility whose facilities (wires) are directly connected to the retail customer's premises. This is the utility that provided all of the electric service to that retail customer before unbundling; and that after unbundling continues to provide at least the retail delivery (transmission) part of the service. "Retail customer" means a person or entity who buys electric power for end use (*i.e.*, does not resell it). "Retail transmission" and "retail delivery" (terms used interchangeably) mean the utility's use of its own transmission and other facilities to deliver electric power to the retail customer at the place of end use.

Of course, many electric utilities provide both retail and wholesale service. In those circumstances, "retail utility" just means that utility to the extent it is providing service to retail customers, and retail transmission (delivery) means the extent to which it is using its own transmission and other facilities to serve retail customers. Where a utility uses a facility (*e.g.*, a transmission line) for both wholesale and retail service, FERC and the state commission each regulates the service within its jurisdiction. This has always been the regulatory scheme under the 1935 Act. *See* p. 19 & n.11, *infra*.

"distribution" under FERC's new seven-factor test. Pet. App. D19-D20, D42, D51-D52.

FERC does not attempt to reconcile this purported surrender of state jurisdiction with the Federal Power Act's basic purpose to preserve state jurisdiction, and to provide federal regulation only where the *Attleboro* line prevented the States from regulating. FERC does not suggest that any pre-Act or post-Act decision of this Court held the States were disabled from exercising any retail transmission jurisdiction. FERC does not deny that the States have continued to exercise this jurisdiction for 60 years under the provisions of the Act that are still in force today. The reasons FERC does give for its jurisdictional claim are deeply flawed, as discussed below.

B. The Case Law and the Legislative History Dispositively Establish That "Local Distribution" Is a "Part" of Transmission in Interstate Commerce That Section 201 Withholds From FERC's Jurisdiction.

The jurisdictional issue arises under Section 201(b)(1) of the Federal Power Act, which provides that the pertinent part of FERC's jurisdiction:

> [S]hall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy . . . . [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . .

16 U.S.C. § 824(b)(1).

That statutory language is the primary reason FERC gives why "jurisdictional lines change" when States unbundle retail service. According to FERC:

> [W]e find compelling the fact that section 201 of the FPA, on its face, gives the Commission jurisdiction over transmission in interstate commerce (by public utilities) without qualification.

Pet. App. D43, E29. FERC's statement is wrong. Section 201 does not give FERC "unqualified" jurisdiction over transmission in interstate commerce

FERC's "without qualification" contention assumes that "local distribution" under Section 201 is, somehow, *not* transmission in interstate commerce. In fact, both the case law leading up to the Federal Power Act and the Congress that enacted it understood that interstate energy moves in a continuum from source to end use.[5] In appreciation of that technological reality, Congress prohibited federal control over the part of the continuum in interstate commerce that the *Attleboro* line put within the States' regulatory ambit.

As shown by the *Attleboro* line of cases, by the legislative history, and by this Court's leading post-Act decision, local distribution is one part — a subset — of transmission in interstate commerce. It also is a part that Section 201 "on its face" *withholds* from FERC's jurisdiction. Because that is so, FERC's logic collapses. Bundled or unbundled makes no difference. Either way, the statute preserves state jurisdiction over the local distribution part of transmission in interstate commerce — which means retail transmission in interstate commerce.

A leading case in the *Attleboro* line involved a retail gas utility that (1) transported gas from Pennsylvania to New York, and (2) sold the gas to retail customers in New York.

5. Pre-Act cases cited to Congress were particularly sophisticated about electricity, including the instantaneous nature of generation, transmission and use. *See Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 177-81 (1932) (discussed in the 1935 Senate Report at 48, 1935 Senate Hearings at 801-02, and 1935 House Hearings at 97); *South Carolina Power Co. v. South Carolina Tax Comm'n*, 52 F.2d 515, 523-24 (E.D. S.C. 1931), *aff'd mem.*, 286 U.S. 525 (1932) (cited in the 1935 Senate Hearings at 802).

Pennsylvania Gas Co. v. Public Service Comm'n, 252 U.S. 23, 27-28 (1920). This Court was quite clear on three points that refute FERC's jurisdictional theory. First, all of the movement of the gas — from source all the way to the retail customer — was transmission in interstate commerce:

> [T]he gas is transmitted directly from the source of supply in Pennsylvania to consumers in the cities and towns of New York .... The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce ....

252 U.S. at 28. Second, New York, in regulating the gas service to retail customers, was regulating a "*part*" of the transmission in interstate commerce:

> The thing which the State Commission has undertaken to regulate, while *part of an interstate transmission*, is local in nature, and pertains to the furnishing of natural gas to local consumers ....

Id. at 30-31 (emphasis added).

Third, although this retail service ("furnishing of natural gas to local consumers") was part of the transmission in interstate commerce, the State was *permitted* to regulate it:

> While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

Id. at 31. These points were reiterated in *Attleboro* itself, including that the state commission in *Pennsylvania Gas* permissibly regulated "part of an interstate transmission" in regulating retail service. 273 U.S. at 87-88.

The legislative history of the 1935 Act establishes, beyond a shadow of a doubt, that Congress knew about and specifically intended to adopt *Pennsylvania Gas*. This express legislative adoption of *Pennsylvania Gas* is stated in the 1935 Senate Report at 48. It is stated in a legal Memorandum authored by the FPC's

General Counsel and its Solicitor.[6] 1935 Senate Hearings at 800-01. The adoption of *Pennsylvania Gas* is substantively stated in a section-by-section analysis FPC Commissioner Seavey gave the House Committee and FPC Solicitor DeVane gave the Senate Committee (saying that "even where the energy comes directly from another State," state jurisdiction "is expressly preserved"). 1935 House Hearings at 386; 1935 Senate Hearings at 247. It is explained by Solicitor DeVane in the 1935 Senate Hearings at 250, and in the 1935 House Hearings at 498, 518, 521-22.

In writing *Pennsylvania Gas* into the Federal Power Act, Congress adopted its holdings that (1) transmission of energy may be transmission in interstate commerce all the way to the retail customer; (2) regulation of retail service is regulation of a "part" of transmission in interstate commerce; and (3) the States properly exercise regulatory jurisdiction over this retail "part." Indeed, these specific aspects of *Pennsylvania Gas* were pointed out to the congressional committees. 1935 House Hearings at 521-22; 1935 Senate Hearings at 761. In testifying that the FPC's bill adopted *Pennsylvania Gas*, the FPC's Solicitor DeVane stated the consequences for federal jurisdiction:

> This bill does *not* give the Commission jurisdiction over energy that is *transmitted in interstate*

6. As this Court has observed, the original 1935 bill (the portions that added to the Federal Power Act) was prepared by the FPC itself. *CL&P*, 324 U.S. at 525, 529. The FPC's bill was presented to Congress by FPC Commissioner Seavy and the FPC's Solicitor DeVane, both of whom had participated in its preparation. 1935 House Hearings at 384, 400-01, 449-50, 515, 553.

This Court has extensively used the legislative history to interpret the jurisdictional scope of the 1935 Act, *e.g.*, *Southern California Edison*, 376 U.S. at 213 & n.8; *CL&P*, 324 U.S. at 525-27 & nn.2-5; *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61, 68 n.7, 71 & n.10, 76-77 & nn.21-24 (1943), and similarly has used the counterpart legislative history of the Natural Gas Act to construe its comparable jurisdictional provisions, *e.g.*, *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana*, 332 U.S. 507, 515 n.11, 517-19 nn.13-14 (1947).

> *commerce by a particular company and sold by that company to consumers*.

1935 Senate Hearings at 250 (emphasis added).

This Court confirmed these points in what FERC admits is the leading case interpreting the "local distribution" limitation on its jurisdiction under Section 201. In *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945) ("*CL&P*"), this Court was clear that, when any part of the electricity moves across state lines, transmission all the way to the retail customer is transmission in interstate commerce.

> Technology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility. *Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state*. It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line.

324 U.S. at 529-530 (emphasis added).

The Court was equally clear that, notwithstanding this technologically expansive scope of transmission in interstate commerce, the 1935 Act was not intended to take from the States (or even "disturb") their jurisdiction under the *Attleboro* line. *Id.* at 525-27. Specifically, this limitation on federal jurisdiction is embodied in Section 201's "local distribution" provision. *Id.* at 530-31.

> The assurance which the sponsors of this legislation expressed as to protection of the general jurisdiction of a state over electric utilities of this character . . . is to be found in the words of § 201(b), "but shall not have jurisdiction, except as provided in this Part and the Part next following, . . . over facilities used in local distribution . . . ."

Id. at 527. Accordingly, it is irrelevant that interstate energy is transmitted in local distribution facilities:

> It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except out-of-state energy and still be exempt under the Act. The test is whether they are local distribution facilities.

Id. at 531.

Therefore, this Court held, *it is not sufficient for federal jurisdiction that a facility is used for "transmission in interstate commerce."* Rather, it *is also* necessary that the facility is *not* used for "local distribution":

> The order [asserting FPC jurisdiction] must stand or fall on whether this company owned facilities that *were* used in transmission of interstate power *and which were not facilities used in local distribution.*

Id. (emphasis added).

For these reasons, *CL&P* vacated the FPC's order. The agency had "found that each of the facilities in question is 'used for the transmission of electric energy purchased as aforesaid from the Connecticut Power Company, as distinguished from local distribution thereof.'" *Id.* at 532. That did not establish federal jurisdiction because:

> [The FPC] *has not, however, made an explicit finding that these facilities are not used in local distribution*; and we are in doubt whether by application of the statute as herein construed it could have done so . . . Nothing except explicit findings excluding the grounds of state control gives assurance that the

> bounds of federal jurisdiction have been accurately understood and fully respected . . . .

Id. at 532 (emphasis added).

Thus, under this Court's controlling precedent, as well as the pre-Act case law incorporated into the Act and the legislative history, FERC is wrong in asserting it has jurisdiction over transmission in interstate commerce "without qualification." Some transmission in interstate commerce is also local distribution. Congress gave FERC jurisdiction only over the part of that transmission which is not associated with delivery to retail customers.

C. The Case Law and the Legislative History Dispositively Establish That "Local Distribution" Under Section 201 Includes Retail Transmission.

A second step in FERC's legal argument builds on the first, and claims the meaning of "local distribution" is not clear. According to FERC, the "relevant legislative history . . . does not directly address the issue of what constitutes local distribution as opposed to transmission in interstate commerce." Pet. App. D96. As discussed, local distribution and transmission in interstate commerce are not mutually exclusive categories. Furthermore, the "relevant legislative history" — and the case law — could not be clearer on the meaning of "local distribution."

Again, the purpose of the 1935 Act was to fill the *Attleboro* gap while not taking any regulatory authority from the States. *CL&P*, 324 U.S. at 526. Therefore — no surprise — in the legislation "Congress . . . adopted the 'mechanical' line established in *Kansas Gas* and *Attleboro* as the statutory line dividing federal and state jurisdiction." *Arkansas Elec. Coop.*, 461 U.S. at 380. By using the *Attleboro* line, "Congress . . . was meticulous to take in only territory which this Court had held the states could not reach." *Panhandle Eastern Pipe Line Co. v. Michigan Public Serv. Comm'n*, 341 U.S. 329, 335 (1951) ("*Panhandle/Michigan*"), quoting *Panhandle Pipe Line Co. v.*

Public Serv. Comm'n of Indiana, 332 U.S. 507, 519 (1947) ("*Panhandle/Indiana*"). The Court has said this time and again.[7]

The *Attleboro* line's division between state and federal jurisdiction is equally clear. *Attleboro* itself applied to electricity the jurisdictional line used for natural gas in *Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924). *See Attleboro,* 273 U.S. at 88-89; *see also Arkansas Elec. Coop.*, 461 U.S. at 378 ("the wholesale/retail line drawn in . . . *Kansas Gas*"); *Southern California Edison*, 376 U.S. at 212 (*Attleboro* "held that *Kansas Gas* . . . controlled").

In turn, *Kansas Gas* held that state regulatory jurisdiction began once out-of-state gas was delivered to an in-state retail utility (called a "distributing company"). 265 U.S. at 308. Behind that line, the State had *complete* regulatory jurisdiction of *all* of the retail utility's service to retail customers. This included not only sale of the gas but also its delivery to the retail customer:

> [The] subsequent sale *and delivery* by these companies to their customers *at retail* is intrastate business and subject to State regulation.

Id. (emphasis added).

Thus, the line between state and federal jurisdiction, drawn by *Attleboro* and its predecessors, is located where electricity in interstate commerce is received by in-state retail utilities. That line, which is precisely the one Congress drew with the local distribution provision in the 1935 Act, puts *all of the retail service* on the States' side — which means that all of the utility's retail facilities and operations, including retail transmission, are subject to state jurisdiction.

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7. *Southern California Edison*, 376 U.S. at 214 ("What Congress did was to adopt the test developed in the *Attleboro* line"); *U.S. v. CPUC*, 345 U.S. at 311 ("Part II is a direct result of *Attleboro*. They are to be read together"); *Panhandle/Indiana*, 332 U.S. at 518 ("The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act") (quoting legislative history). Cases decided under the Natural Gas Act are direct authority on this jurisdictional issue under the Federal Power Act. *Southern California Edison*, 376 U.S. at 211-15; *U.S. v. CPUC*, 345 U.S. at 311.

Kansas Gas involved a common fact pattern, where the utility that transmits energy into a State sells it at wholesale to a local utility that provides retail service. As discussed above, *Pennsylvania Gas* addressed a different situation, where the same company doing the interstate transmission also provides retail service to consumers in the importing State. In that situation as well, this Court upheld the State's authority to regulate the retail service. 252 U.S. at 29-31. *See also U.S. v. CPUC*, 345 U.S. at 303 ("*Attleboro* reiterated and accepted the holding of *Pennsylvania Gas* . . . that sales across the state line direct to consumers is a local matter within the authority of . . . the importing state"). As noted, in accordance with the assurance that the 1935 Act would not take from the States any regulatory jurisdiction they had under the *Attleboro* line, the legislative history repeatedly affirms that the Act would not change the result in the *Pennsylvania Gas* situation either.[8]

Standing alone, the above points would establish unquestionably that local distribution facilities under Section 201 include all retail transmission facilities. States regulated all retail service, including all retail delivery, under the *Attleboro* line. Congress promised to adopt the *Attleboro* line so that all state authority would be preserved. Congress kept its promise by "forbid[ding]" federal jurisdiction over local distribution facilities in Section 201. *CL&P*, 324 U.S. at 528-31.

But the above points do not stand alone. *Kansas Gas*, the very case that *Attleboro* followed, used the term "local distribution" to encapsulate the retail service, including delivery, that was subject to state regulation — both when provided by an in-state retail utility, and also when provided by the utility that transmitted the energy across state lines.

> The business of supplying, on demand, local consumers is a local business, even though the gas

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8. *E.g.*, 1935 Senate Report at 48; 1935 Senate Hearings at 250 (FPC Solicitor DeVane), 800-01 (legal Memorandum prepared by FPC attorneys). Indeed, the FPC's Solicitor said regarding *Pennsylvania Gas* that "we are writing the Supreme Court's decisions in this bill." 1935 House Hearings at 523; *see id.* at 498, 499, 518, 521-22.

> be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the *local distribution* be made by the transporting company or by independent distributing companies.

265 U.S. at 309 (emphasis added).

Thus, transmission (delivery) service to retail customers was not only state-jurisdictional under the *Attleboro* line, it was also called "local distribution." *See also Arkansas Elec. Coop.*, 461 U.S. at 377-78. As if to hammer the last nail home, the legislative history says that facilities for local distribution include "transmission lines":

> Insofar as the facilities are concerned, [the bill] takes no jurisdiction away from the States, but it does confer additional jurisdiction upon this Commission as to those facilities that have to do with interstate transmission.
>
> I want to make that distinction very clear, because it has nothing to do with facilities that relate only to local distribution *or to transmission lines used for local distribution.*

1935 House Hearings at 501 (FPC Solicitor DeVane) (emphasis added).

FERC did not confront this dispositive case law and legislative history. Instead, it claimed its jurisdictional theory is supported by statements in the Senate Report that Section 201 was amended to clarify that FERC's jurisdiction "includes interstate transmission where there is no sale"; and that federal jurisdiction "is asserted . . . over all interstate transmission lines whether or not there is a sale of the energy carried." Pet. App. at D97-D98 (quoting 1935 Senate Report at 19, 48). In fact, these references to federal jurisdiction where there is "no sale" relate to Congress's adoption of *Pennsylvania Gas*, under which States have regulatory jurisdiction over retail service where the retail utility's operations extend across state lines.

In the *Pennsylvania Gas* situation, it was often difficult for a State to regulate the retail service effectively, because the state commission did not have jurisdiction over and was unable to obtain information about the true cost of the utility's facilities located out-of-state but used to provide in-state retail service. 1935 Senate Hearings at 247. For this reason, the 1935 Act empowered the FPC to *assist* state commissions by investigating and determining the cost of out-of-state facilities — *i.e.*, to "aid the State commissions in determining just and reasonable rates for energy by companies having properties in more than one State." *Id.*; 1935 House Hearings at 385; *see also* 1935 House Report at 8; 1935 House Hearings at 519-20. This federal assisting power is still found today in 16 U.S.C. § 824e(d), which gives FERC authority to investigate and determine costs "in cases where [it] has no authority to establish a rate governing the sale of such energy."[9]

Congress clearly intended to (and did) give the FPC assisting jurisdiction where there is "no sale." To have this assisting power, the FPC had to be given jurisdiction of "interstate transmission where there is no sale" — *i.e.*, jurisdiction over the out-of-state facilities whose cost the federal commission is to determine for the state commission. *See id.* But this limited assisting authority is a far cry from the regulatory authority FERC claims to set rates, terms and standards for, and otherwise control, retail transmission service.[10]

9. The references in the Senate Report to federal jurisdiction over facilities "where there is no sale" and "whether or not there is sale of the energy" mean jurisdiction regardless of whether there is a sale at *wholesale* (the absence of which being the reason why FERC would have "no authority to establish a rate," 16 U.S.C. § 824e(d)). *See* 1935 Senate Hearings at 247 (FPC's section-by-section analysis) ("where no wholesale rate is involved"); 1935 House Hearings at 385 (same). If there truly is "no sale" of any kind, FERC has no jurisdiction because Section 201 excludes facilities for transmission of energy "consumed wholly by the transmitter." 16 U.S.C. § 824(b)(1).

10. In addition to the FPC's assisting power, the Senate Report's statement about federal jurisdiction over interstate transmission facilities (Cont'd)

D. The Scope of FERC's Jurisdiction is Established by Statute and is not a Factual Inquiry.

In *CL&P*, this Court made plain that, because "technologically" every facility from the generator to the retail customer (including the customer's "cord from a light plug to a toaster on the breakfast table") is a "facility for transmission of interstate energy," Congress intentionally chose not to legislate to the full extent of its power under Commerce Clause. 324 U.S. at 529-30. Instead, Congress' "constant purpose [was] to protect" state authority under the *Attleboro* line. *Id.* at 525-26. Because Congress effectuated this purpose by prohibiting federal jurisdiction "over facilities used in local distribution," *id.* at 527, 530-31, this Court held the local distribution "phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test," *id.* at 531.

To support its claim that a State's unbundling of retail service causes the Act's "jurisdictional lines" to "change," FERC invoked this Court's statement reaffirming *CL&P* and adding that the federal agency is to decide fact issues:

> Whether facilities are used in local distribution — although a limitation on FPC jurisdiction and a legal standard that must be given effect in addition to the technological transmission test . . . — involves a question of fact to be decided by the FPC as an original matter.

Pet. App. D112 (quoting *Southern California Edison*, 376 U.S. at 210 n.6). Based on this quotation, FERC says that it "cannot

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"whether or not there is sale of the energy carried" may also refer to interconnection authority under Section 202 (16 U.S.C § 824a(b)-(d)), or even to a broader concept of FPC "coordination" authority. 1935 Senate Report at 48. The Senate bill would have given the FPC jurisdiction over generation as well as transmission facilities, saying that the "physical inseparability of generation and transmission . . . makes regulation of transmission impossible unless generation is also controlled." *Id.* at 48-49. The House excluded generation facilities from FPC jurisdiction, however. 1935 House Report at 27; *see* 16 U.S.C. § 824(b)(1).

divine" a "bright [jurisdictional] line for unbundled retail transmission by the public utility that previously provided bundled retail service"; and that "whether facilities are used in local distribution" after retail unbundling "is a question of fact to be decided by the Commission as an original matter." Pet. App. D48 & n.546. *See also, e.g., id.* at D123, E31 & n.453 (finding itself "particularly persuaded" by this argument), E46.

Contrary to FERC's argument, the *Southern California Edison* footnote shows on its face that the "question of fact" to be decided by FERC "as an original matter" is how any particular facility is *used* by the utility — *i.e.*, for retail service, wholesale service, or both. 376 U.S. at 210 n.6. In that case, the FPC found (and this Court found evidence to support) that some of the utility's facilities were used — indeed, were used exclusively — to *sell wholesale power to another utility*. Those facilities included both a substation and portions of two 12 kv. lines that extended beyond the point where the utility's last retail customer was served. *Id.*[11]

This FERC fact-finding authority — to determine the manner in which a given transmission facility of a given utility is used, and specifically to determine whether it is used to supply the "interstate commerce" element for FERC-jurisdictional wholesale transactions — does not empower the agency to circumvent the local distribution "*legal standard* that must be given effect in addition to the technological transmission test . . . ." *Id.* (emphasis added); *CL&P*, 324 U.S. at 531-32. *Cf. Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S.

11. A given facility (such as a transmission line) may be used by a utility to provide electric service to both retail and wholesale customers, but such "dual use" has not created significant jurisdictional problems under the Federal Power Act. The state and federal regulator each regulates the service within its jurisdiction. As FERC said in Order 888-A, for example, costs of dual use facilities are allocated between the federal (wholesale) and state (retail) jurisdiction for ratemaking purposes. 3 F.E.R.C. Stats. & Regs., ¶ 31,048, at 30,414 & n.707. The same point is discussed in the legislative history. 1935 House Hearings at 505 (FPC Solicitor DeVane).

359, 376 (1998) ("An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding"). Under the local distribution legal standard, where a State chooses to unbundle retail service, the Federal Power Act's line between state and federal jurisdiction shines as brightly in the same location as ever: All electric service by a retail utility to a retail customer, including specifically transmission service for that customer, is on the State's side of the line. FERC's need to decide fact issues about whether particular facilities are used for wholesale service in interstate commerce is no basis for the agency to blind itself or others to the bright line legal standard that Congress adopted.

Based on its faulty premise that local distribution is only a "question of fact," FERC announced its seven-factor test for divvying up retail "transmission" and "local distribution" facilities (and taking jurisdiction over everything that falls into the retail "transmission" category). Pet. App. D123-D125. *FERC* did not purport to show that its test for local distribution facilities has *any* connection with Congress' reason for that statutory provision — which was to preserve state regulatory jurisdiction. To the contrary, the seven-factor test is designed to shift retail transmission jurisdiction to FERC, thereby serving its proclaimed interests "in preventing any balkanization of the interstate power market," Pet. App. D46, and "ensur[ing] that non-discriminatory transmission services are provided to all potential retail power competitors," *id.* at E48.

However, the States are free under the Federal Power Act to maintain so-called "balkanization" and "discrimination" in the retail power market, by retaining the traditional system of monopoly utility service and regulation for retail power. Congress has forbidden FERC from circumventing that State decision. 16 U.S.C. § 824k(g)-(h). FERC's interests in the retail market are unexplained.[12]

12. As this Court recognized, Congress may have intended precisely to preserve "balkanization" in service to other, fundamental values:

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Particularly damning is FERC's admission that its seven-factor test may result in the conclusion that *no* local distribution facilities are used for retail service in a given situation. Pet. App. D48-D49. That FERC's test can eliminate any "local distribution facility" for retail service — the statutory category intended by Congress to preserve state jurisdiction, under a statutory provision "the Commission must observe and the courts must enforce," *CL&P*, 324 U.S. at 529 — demonstrates fundamental error frustrating the will of Congress.

Finally, FERC's seven-factor test blatantly does what none of the regulatory cases in the *Attleboro* line ever did, and none of this Court's cases under the Federal Power Act has ever done. FERC's test goes behind the point of delivery of interstate power to the retail utility and, based on factors like voltage, splits the utility's retail facilities and operations into Federal and State

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> [S]tate lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and federal officials in administering an act such as we have here. Conflicts which lead state officials to stand shoulder to shoulder with private corporations making common cause of resistance to federal authority may be though to be prejudicial to the ends sought by an act and regulation more likely to be successful, even though more limited, if it has local support. Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the "insulated chambers of the states" are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.

CL&P, 324 at 530.

regulatory camps. This cannot be reconciled with the statute Congress enacted, which "adopted the 'mechanical' line established in *Kansas Gas* and *Attleboro* as the statutory line dividing federal and state jurisdiction." *Arkansas Elec. Coop.*, 461 U.S. at 380. Under that *statutory* line:

> With the delivery of the gas to the distributing companies . . . the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation.

Kansas Gas, 265 U.S. at 308.[13]

E. FERC's Jurisdictional Analysis Misuses This Court's Precedents.

As support for the "changing jurisdiction lines" theory, FERC places much emphasis, and the court below placed exclusive emphasis, on *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), and *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61 (1943). These cases could not be more inapposite. Each shows, on a particular fact pattern involving wholesale transactions, the expansive nature of "transmission in interstate commerce" when electric systems are interconnected (which simply illustrates *CL&P*'s point about "the [t]echnology of the business," 324 U.S. at 529).[14]

In contrast, this case concerns a public utility's use of its own wires to provide service to its retail customers, and whether

13. The fate of the one decision of this Court that jurisdictionally divided an in-state utility's retail facilities and operations under the Natural Gas Act, *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950), is addressed below.

14. The *Jersey Central* opinion states that the utility was selling power to another utility (*i.e.*, selling at wholesale). 319 U.S. at 64-65, 68. The *Florida Power* opinion states that the utility exchanged power with four other utilities, 404 U.S. at 456 & n.4, which is also a type of wholesale transaction, *see id.* at 458. This is elaborated by the portion of the FPC hearing officer's opinion the Court discussed (*id.* at 456 n.4). *See Florida Power & Light Co.*, 37 FPC 544, 1966 FPC LEXIS 427, *4-6 (July 12, 1966); *see also id.* at *1.

that use is for the local distribution that is exempted from FERC's jurisdiction over transmission in interstate commerce. Neither *Florida Power* or *Jersey Central* has the slightest thing to do with retail service, retail customers, retail transmission or local distribution facilities. They are no support at all for FERC's position on the issue presented here.

In fact, *Florida Power* undermines FERC's position. The Court reiterated that Part II of the 1935 Act "fills the 'Attleboro gap,'" and therefore applies to exchanges of power between utilities across state lines. 404 U.S. at 458. The Court also rejected the utility's argument that reserved state jurisdiction needed more protection than "the 'engineering and scientific test' that controls this case" — *i.e.*, a case involving *wholesale* transactions. *Id.* at 467. In doing so, the Court reiterated that Section 201(b)'s local distribution provision protects the jurisdiction the Act reserves to the States:

> On top of the "engineering and scientific test" that controls this case, the Federal Power Act imposes a "legalistic or governmental" test. Federal jurisdiction may not reach "facilities used in local distribution" of energy. 16 U.S.C. § 824(b). Thus, *state jurisdiction is clearly demarcated and preserved. Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945).

Id. (emphasis added).[15]

15. Presumably as support for its seven-factor test, FERC at one point refers to the statement in *U.S. v. CPUC*, 345 U.S. at 316, that "the facilities supplied 'local distribution' only after the current was subdivided for individual consumers." Pet. App. D116. In that case, however, the FPC asserted jurisdiction over *wholesale* transactions. 345 U.S. at 297-98. This Court indicated that wholesale transactions would be exempt from federal jurisdiction if local distribution facilities were used (but said the wholesaler was not using such facilities on the facts presented). *See id.* at 316. *Accord Southern California Edison*, 376 U.S. at 210 & n.6. FERC's attempt to apply wholesale cases out-of-context to retail service is inappropriate. In particular, the concept of a wholesaler "subdividing" electric power (a notion analogous to the

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For its jurisdictional theory, FERC also put considerable emphasis on *FPC v. East Ohio Gas Co.*, 338 U.S. 465 (1950). Pet. App. D119-D120. That case, decided under the Natural Gas Act, did "split" a utility's retail operations and facilities, and allowed the FPC to assert jurisdiction based on the utility's high pressure pipelines that carried gas to the communities it served at retail. For a variety of reasons, *East Ohio* does not support FERC's position that retail service can become FERC-jurisdictional under the Federal Power Act.

One reason is that, as this Court recently noted, Congress promptly reversed *East Ohio* with legislation that returned in-state retail gas utilities to exclusive state jurisdiction — "*as always has been intended.*" *General Motors Corp. v. Tracy*, 519 U.S. 278, 293 (1997) (emphasis added) (quoting S. Rep. No. 817, 83d Cong., 1st Sess., 1-2 (1953)). The decision was wrong and was decisively repudiated.

Furthermore, *East Ohio* necessarily rejected the jurisdictional analysis in *Pennsylvania Gas*, 252 U.S. 23. *See East Ohio*, 338 U.S. at 470 n.10. After *East Ohio*, however, this Court returned to *Pennsylvania Gas* and its jurisdictional analysis in *Panhandle/Michigan*, 341 U.S. at 333, 337, a decision this Court recently — and forcefully — reaffirmed. *General Motors v. Tracy*, 519 U.S. at 292, 305-06. Thus, *East Ohio's* jurisdictional analysis was also wrong and repudiated.[16]

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"original package" doctrine employed in tax cases and discussed below) is inapplicable to the local distribution issue in the *retail* service context. This Court has so held. *CL&P*, 324 U.S. at 533-34.

16. In rejecting *Pennsylvania Gas*, the *East Ohio* opinion relied on the reasoning in *East Ohio Gas Co. v. Tax Comm'n*, 283 U.S. 465 (1931). *See* 338 U.S. at 470 n.10, 472-73 n.13. The first *East Ohio* decision was a case involving state taxation, however. If it had adopted the analysis in *Pennsylvania Gas*, which considered the transmission in interstate commerce to extend all the way to the retail customer, the State could not have been allowed to tax in *East Ohio* under the then-standard rule that States could not directly tax interstate commerce.

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Finally, *East Ohio*, whatever its stature under the Natural Gas Act, could not possibly be correct under the Federal Power Act. As reviewed above, the legislative history states — again and again — that this Act *adopts Pennsylvania Gas*.

II. FERC's Construction Of Section 201 Is Not Entitled to Deference.

In the alternative to relying on *Florida Power* and *Jersey Central*, the court below said FERC's jurisdictional ruling should be affirmed under "the deferential standard" of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. C33. This is error. The "deference" principle of *Chevron* is, at bottom, a rule of statutory construction. *See* 467 U.S. at 843 n.9. Congress provided for a different rule of construction under the Federal Power Act.

Section 201(a), 16 U.S.C. § 824(a), sets forth a declaration of purpose for the 1935 additions to the Federal Power Act. In what this Court has called the legislation's "policy declaration" and "policy provision," the last phrase of Section 201(a) provides "that federal regulation is 'to extend only to those matters which are not subject to regulation by the States . . . . '" *CL&P*, 324 U.S. at 527. This policy provision does not "nullify a clear and specific grant of jurisdiction," but also "cannot be wholly ignored." *Id.*

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The first *East Ohio* case avoided that result (and so upheld state authority to tax) by reasoning analogous to the "original package" doctrine used for other commodities. *See* 283 U.S. at 470-71 . This kind of reasoning, which as applied to energy focuses upon factors like "reducing the pressure" and "dividing the energy," was commonly used in taxation cases of that era. *See, e.g., Southern Nat. Gas. Corp. v. Alabama*, 301 U.S. 148, 154-55 (1937). It was not the basis for the *Attleboro* line addressed to state *regulatory* jurisdiction, however, and (as this Court held) is not the proper analysis for determining "local distribution" facilities under the Federal Power Act. *CL&P*, 324 U.S. at 533-34.

> [S]uch a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or definiteness in the specific provisions which purport to carry out its intent.

Id. Therefore, if the meaning of the local distribution provision is "otherwise in doubt[, it] *should be read in harmony with [Section 201(a)'s] policy provision.*" *Id.* at 529 (emphasis added); *see also id.* at 533.

Thus, the statute contains its own rule of construction to be used when the meaning of the jurisdictional provision is uncertain. That rule is to preserve state authority in matters States could regulate under the *Attleboro* line. Retail transmission certainly qualifies as a "matter[] . . . subject to regulation by the States." States have regulated it from Day One under the 1935 Act. Accordingly, any reasonable doubt about FERC's "changing transmission jurisdiction" thesis is resolved against FERC by Section 201(a)'s rule of construction.

Of course, *Chevron* itself does not yield deference to FERC's "changing lines" interpretation of its jurisdiction under Section 201. As the Court said:

> The judiciary . . . must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 n.9. Here, Congress *did* have "an intention on the precise question at issue." As this Court has repeatedly said, the intention was to adopt the *Attleboro* line. The legislative history materials — "traditional tools of statutory construction" — establish beyond question that Congress did not intend to take any regulatory jurisdiction from the States. As States always regulated transmission to retail customers, "that is the end of the matter." *Chevron*, 467 U.S. at 842.

III. The Consequences Of FERC's Assertion Of Jurisdiction Over Retail Transmission Are Terribly Intrusive Of State Regulatory Authority.

California's deregulation scheme for retail electricity required the State's large privately-owned utilities to transfer control (though not ownership) of their transmission facilities to an Independent System Operator ("ISO"). The ISO is a state-created, non-profit corporation that operates the ceded transmission as a coordinated system.[17] The state legislation that created the ISO made it subject to supervisory control by a state-created Oversight Board.[18] California and FERC have disagreed, frequently and deeply, about important matters concerning these state-created institutions.

From the outset, FERC claimed authority to negate the Oversight Board's supervisory functions.[19] Recently, FERC has claimed authority to dismiss the ISO's Governing Board and give temporary control of the State's transmission system to management personnel, contrary to California corporation law; to change the constituencies of the Governing Board; and to specify the qualifications for Board members and the manner of their selection — all so as to bypass control of the ISO by the government of the State that created the institution and provided its authority.[20] These controversies have been punctuated by

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17. Cal. Pub. Util. Code §§ 345 *et seq.*

18. Cal. Pub. Util. Code §§ 335, 348. The statutory findings explain that maintaining the transmission system and reliable electric service are "of paramount importance" to health, safety and economic welfare; and therefore that, in providing for retail deregulation, the Legislature created the Oversight Board to maintain public accountability and ultimate control over the ISO and "various market-based mechanisms." Cal. Pub. Util. Code § 334.

19. *Pacific Gas & Elec. Co.*, 77 FERC ¶ 61,204, at 61,817-19 (1996).

20. *San Diego Gas & Elec. Co. v. Sellers of Energy*, 93 FERC ¶ 61,121, at 61,362-64 (2000) (proposed order), 93 FERC ¶ 61,294, at 62,012-14 (2000) (final order).

threats of FERC lawsuits,[21] and FERC's recent action was described as "needlessly provoking a constitutional showdown."[22] This intrusion deep into state affairs is premised on the erroneous assertion of the shifted jurisdictional line.

The consequences of FERC's jurisdictional thesis run deeper. States exercise jurisdiction over retail transmission, including rates and other terms and conditions of service, in light of the legal duties a public utility owes to its retail customers. These duties, which are imposed by state statutes, regulations and utility franchises, traditionally include obligations to serve all customers in the utility's service area without discrimination, and to provide adequate service. The obligation to provide adequate service includes construction and maintenance of physical facilities (including transmission facilities) sufficient to supply the amount of retail service demanded. There are often special rules to protect essential service to particularly vulnerable members of the community, and allocation rules for times of shortage or emergency. This Court has recently affirmed these deeply engrained local concerns as being of particular importance in utility-related Commerce Clause litigation. *See General Motors v. Tracy*, 519 U.S. at 290 (a public utility's monopoly on essential service is "balanced by regulation and the imposition of obligations to the consuming public"); *id.* at 294-97 (discussing public utility regulations and obligations of retail gas utilities), *id.* at 306 (discussing the States' "important interests" in regulating retail service, including that residential customers "are not frozen out of their houses in the cold months").

In contrast to state-regulated retail service, federal law does not impose these general public utility-type service obligations on the FERC-jurisdictional portion of an electric utility's

21. *California Power Exch. Corp.*, 1998 FERC LEXIS 2361, at *30-31 (Nov. 24, 1998); *San Diego Gas & Elec. Co. v. Sellers of Energy*, 2000 FERC LEXIS 2491, at *207-08 (Dec. 15, 2000) (Hoecker, concurring further) (issued Jan. 18, 2001).

22. *San Diego Gas & Elec.*, 93 FERC ¶ 61,121, at 61,386 (Herbert, concurring).

business. Congress refused the FPC's request for provisions in the 1935 Act that would have created public utility obligations at the federal level and given the federal agency jurisdiction over construction of transmission and other facilities.[23] As a consequence, and as FERC stated in a Notice underlying Order 888, service obligations at the federal level are largely contractual in nature. *Recovery of Stranded Costs By Public Utilities and Transmitting Utilities*, 59 Fed. Reg. 35274, 35278 (July 11, 1994).

Changing jurisdiction of retail transmission from the States to FERC entails a move from the one type of regulatory framework to the other. It also shifts policy choices from state regulators to federal; and, with this shift from State Capitols to Washington D.C., invariably come changes in the kinds of policies that are favored and in the groups whose voices are most strongly heard.

A good example is close at hand. In times when transmission is short, because of equipment failure or capacity constraints, States commonly require electric utilities to protect first the retail customers to whom public utility obligations are owed (and in whose interests the utility is given its service monopoly by State law). FERC's antipathy to this policy is well known, but its attempt to override state policy by using its wholesale jurisdiction was rebuffed. *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied sub nom. Enron Power*

23. *See, e.g.*, 1935 Senate Hearings at 246 (describing Sections 202 and 204 of the bill prepared by the FPC); 1935 Senate Report at 19-20 (discussing the decision to eliminate these provisions and requirements); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 383-85 (1973) (Stewart, J., concurring and dissenting) (discussing some of the Senate's changes). The authority Congress did give FERC is very circumscribed. *See* 16 U.S.C. §§ 824a(b) (FERC may not order interconnection and sale or exchange of energy that would require the electric utility to enlarge its generation facilities, or that would impair adequate service to the utility's retail customers); 824f (same limitations on FERC's authority to remedy complaint of inadequate service, and such a complaint may only be filed by a state commission).

Mktg., Inc. v. Northern States Power Co., 528 U.S. 1182 (2000). If FERC obtains jurisdiction over retail transmission facilities, however, it can implement its different policy for retail customers directly — even though it has never regulated retail service and never before claimed authority to do so.

CONCLUSION

There are policy arguments, which the Court will hear from Enron and others, that control of the electricity transmission system should be shifted to the Federal Government. The issue is not policy. It is who will decide "to displace a state regime with the federal one, since the Congress promised that as much as possible be left to the States." *Florida Power*, 404 U.S. at 476 (Douglas, J., dissenting). Congress did not confer that power on FERC, which nevertheless has claimed it. This Court should hold that only the politically responsible Branch that made the promise has authority to revoke it.

The portions of FERC's Order asserting jurisdiction over unbundled retail transmission should be vacated.

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